

**Report on
The Doctrine of Implied
Grant: the rule in Wheeldon
v. Burrows**

**A Report prepared for the British Columbia Law
Institute by the Members of the Real Property
Law Reform (Phase 2) Project Committee**

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INTRODUCTORY NOTE

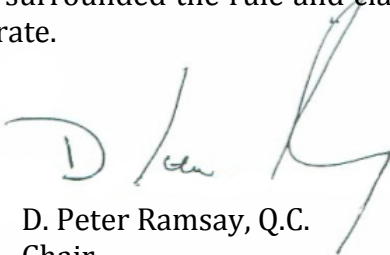
Report on the Doctrine of Implied Grant: the rule in *Wheeldon v. Burrows*

The doctrine of implied grant, also known as the rule in *Wheeldon v. Burrows*, has always been considered to be obscure, convoluted and difficult to apply consistently. This doctrine may apply when a landowner transfers part of the land and retains the rest. It allows for implied easements to arise over the retained land retained so as to allow reasonable use of the transferred portion. The doctrine of implied grant also applies to leases and dispositions of land by will.

While subdivision control and the indefeasibility provisions of the *Land Title Act* tend to narrow the circumstances in which the doctrine of implied grant will operate to create an implied easement, this common law rule persists. It has occasionally been invoked by British Columbia courts.

This report considers whether there is a need to retain the doctrine of implied grant or some version of it in the face of modern-day subdivision control. The report concludes that a modified statutory version of the rule is worth retaining. The rule is sometimes capable of producing a fair and practical result when the parties to a land transaction have not foreseen the need to create easements in order to allow reasonable use of the land in question after the transaction is completed.

The legislative modification of the doctrine of implied grant recommended in this report would remove the obscurity that has always surrounded the rule and clarify the circumstances in which it could still usefully operate.

A handwritten signature in blue ink, appearing to read 'D. Peter Ramsay', is positioned above the typed name.

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EXECUTIVE SUMMARY

The common law doctrine of non-derogation from grant holds that when the ownership of land changes, the previous owner cannot assert rights in the land transferred to the new owner beyond what is expressly reserved. By extension, the new owner can reasonably expect to have the same rights in the land granted away as the previous owner had. The rule in *Wheeldon v. Burrows*, also known as the doctrine of implied grant, is an offshoot of this idea and is considered to be a branch of the doctrine of non-derogation from grant.

The rule in *Wheeldon v. Burrows* applies when part of a tract of land is disposed of and part is retained, or when land is disposed of simultaneously in different parts. The transferee is considered to acquire easements over the parcel retained by the transferor, or over other parcels disposed of at the same time, that are “continuous and apparent” and necessary for the reasonable enjoyment of the parcel of land granted away, provided that they were exercised (as incidents of ownership of the entire tract) by the transferor at the time of the transfer for the benefit of the parcel granted. The rule also applies to leases and dispositions of land by will. In being related to “reasonable enjoyment,” a *Wheeldon v. Burrows* easement differs from an easement of necessity, which is also an easement implied by law but depends on different principles.

The rule is convoluted and obscure. Since *Wheeldon v. Burrows* was decided in 1879, uncertainty has always surrounded the meaning of “continuous and apparent,” and it still unclear whether the requirements for implication of an easement are synonymous, alternate, or cumulative.

The rule in *Wheeldon v. Burrows* survives in British Columbia, although the scope for its application has been greatly eroded by the *Land Title Act* and, in particular, modern subdivision control. The *Land Title Act* serves to confine the operation of implied easements primarily to the original parties to a disposition of land. Subdivision control tends to prevent problems from arising in relation to access that might otherwise call for the application of the common law rule.

This report considers whether the rule in *Wheeldon v. Burrows* should be abolished, left alone, or modified, and concludes that as there is still room for the implication of easements to achieve a just result, statutory modification is warranted.

The reform proposed is to abolish the common law rule and create a new statutory test for the implication of an easement arising from a disposition of land. The “continuous and apparent” requirement and the requirement for exercise of the same

rights by the transferor at the time of the transfer as those claimed by the transferee would be abandoned. In place of the common law rule, the new statutory rule would provide that a transfer, lease or disposition by will of a portion of a land holding would create easements over the retained portion for the benefit of the transferred, leased, or devised parcel that are necessary for its reasonable use. Simultaneous disposition of an entire tract of land in parts would operate in similar fashion to create easements between the parcels. The provision would be subject to contrary agreement or a contrary intention appearing from the terms of a will. It would also be expressly subject to the *Land Title Act*.

The proposed reforms will clarify and simplify the law, while preserving a seldom-used but occasionally effective route to a just solution when the parties to a land transaction have not adequately addressed their minds to the implications of their dealings.

PART ONE

I. THE RULE IN *WHEELDON V. BURROWS*

A. Introduction

When the ownership of land changes, it is a natural expectation that the new owner will get the full benefits that flow from ownership and occupation of that land, including whatever rights the previous owner had with respect to it. The common law protected that natural expectation through the doctrine of *non-derogation from grant*. This doctrine holds that the previous owner is prevented from asserting any interest or rights in the land transferred to the new owner beyond what the previous owner expressly reserves in the terms of the transfer.

By extension of this proposition, when an owner of land transfers away part of the land and retains the rest, the transferee can reasonably expect to have the same rights in the parcel of land granted away as the transferor previously had in it. These may sometimes include rights or patterns of use relating to or affecting the portion of land retained that are necessary to full enjoyment of the transferred parcel. For example, if the transferor used a particular road or pathway across the retained portion of the land in order to reach the transferred parcel because it was the only practical or convenient means of access, the transferee might need to use the same road or pathway to gain access. If the transferee were unable to reach the transferred land in the same manner, the transferee would effectively be denied the full enjoyment of the transferred parcel.

Similarly, if pipes or culverts located partly on the retained parcel were used continuously before the transfer to drain the transferred parcel, preventing the transferee from continued use of the existing drainage facilities could detrimentally affect the transferee's reasonable use of the land acquired.

A common law rule developed whereby a transferee of land was deemed to receive rights with respect to the portion of land retained by the transferor that had previously been exercised by the transferor on that retained portion before the transfer, and that were necessary to the enjoyment of the parcel transferred. The transferee held these rights as easements over the retained portion of land.¹ This rule is con-

1. An easement is a right over the land (servient tenement) of another that accommodates the land (dominant tenement) belonging to the holder of the right. It is an interest in land that passes with

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sidered to be a corollary of the doctrine of non-derogation from grant, and is known by the name of the case in which it was authoritatively restated, *Wheeldon v. Burrows*.² The rule was expressed in that decision in the following terms:

[O]n the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions.³

The rule is also referred to as the “doctrine of implied grant,” although it is actually only one of several ways in which an implied easement could arise at common law.⁴ It is sometimes referred to also as the “doctrine of apparent convenience and accommodation.”⁵

the title to the dominant tenement and is binding on successive owners of the servient tenement. See Jonathan Gaunt and Paul Morgan, eds. *Gale on Easements*, 17th ed. (London: Sweet & Maxwell, 2002) at 3.

2. (1879), 12 Ch.D. 31 (C.A.).
 3. *Ibid.* at 49, per Thesiger, L.J. The term “*quasi* easement” denotes a right enjoyed or exercised by an owner or occupier of land over part of the land for the benefit of another part as an incident of ownership or occupation, which would be an easement if the benefited part of the land and the part over which the right is exercised had different owners: *Gale on Easements, supra*, note 1 at 20. At common law owners and lessees of land could not hold an easement over land which they owned or occupied, and therefore such an accommodation or benefit could not be a true easement as long as the benefited and servient portions of land had a common owner or occupier. In British Columbia this common law rule has been altered by ss. 18(5) and (7) of the *Property Law Act*, R.S.B.C. 1996, c. 377, so that owners and lessees having a registered lease can grant easements to themselves over land they own or occupy for the benefit of other land that they own or occupy.
 4. The means by which an implied easement can arise from a grant (i.e. a transfer, lease, or will) if an intention to create the easement can be inferred are summarized in *Gale on Easements, supra*, note 1 at 108: 1. Where the grant contains particular words of description, or by estoppel in such a case; 2. Where the parties contemplated that the land granted would be used in a particular manner and the easement is necessitated by that use (easements of common intention); 3. Under the doctrine of non-derogation from grant; 4. Where the land granted would otherwise be inaccessible or unusable (easements of necessity); 5. Under the rule in *Wheeldon v. Burrows, supra*, note 2. See *Pilcher v. Shoemaker* (1997), 13 R.P.R. (3d) 42 (B.C.S.C.), at para. 17.
 5. As in *Ellis v. Eddy Holding Ltd.* (1996), 7 R.P.R. (3d) 70 (B.C.S.C.) and *Babine Investments Ltd. v. Prince George Shopping Centre Ltd.* (2002), 100 B.C.L.R. (3d) 199, at para. 25 (C.A.).
-

The rule applies when separate parcels of land are created from one parcel under a lease⁶ or a will⁷, as well as by sale and transfer.

B. Application of the Rule in *Wheeldon v. Burrows* in British Columbia

1. COEXISTENCE WITH THE *LAND TITLE ACT*

The rule in *Wheeldon v. Burrows* has been held to apply in British Columbia in an authoritative decision of the Court of Appeal, settling doubts expressed in a few earlier trial decisions that suggested the rule was not compatible with the *Land Title Act*.⁸ Interests arising by implication like *Wheeldon v. Burrows* easements can nevertheless be defeated through the operation of the Act.

Section 23(2) of the *Land Title Act* provides that an indefeasible title is conclusive evidence that the person named in the title as the registered owner is the owner of the fee simple, subject only to the interests endorsed on the title and a small list of exceptions relating to certain interests and claims that affect the title without being endorsed or noted against it.⁹ The *Land Title Act* further provides that except in

6. *Gale on Easements*, *supra*, note 1 at 108.

7. *Allen v. Taylor* (1880), 16 Ch.D. 355.

8. R.S.B.C. 1996, c. 250. See *Babine Investments Ltd. v. Prince George Shopping Centre Ltd.*, *supra*, note 5, overruling dicta on this point in *Openshaw v. Bhalla* (2000), 31 R.P.R. (3d) 242 (S.C.). In *Babine Investments* the majority in the British Columbia Court of Appeal appeared to predicate the finding of an implied easement of access via a closed lane to the rear doors of a commercial building on both the rule in *Wheeldon v. Burrows* and the doctrine of non-derogation from grant, without appearing to distinguish between them. It is clear from the judgment, however, that the majority considered both principles to survive in coexistence with the *Land Title Act*. The possibility of an easement arising under the rule in *Wheeldon v. Burrows*, *supra*, note 2 by way of a mortgage of one parcel of land granted by the owner of two adjacent parcels was also acknowledged in *Household Commercial Canada Inc. v. Hills of Columbia Enterprises Ltd.*, [1997] B.C.J. No. 2653 (S.C.), but the point was not decided because an order *nisi* of foreclosure had rendered issues concerning the extent of the mortgage security *res judicata*.

9. The full list in s. 23(2) of the interests, rights and claims to which an indefeasible title is subject is as follows:

- (a) the subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown;
- (b) a federal or Provincial tax, rate or assessment at the date of the application for registration imposed or made a lien or that may after that date be imposed or made a lien on the land;

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cases of fraud, unregistered interests do not affect anyone acquiring a transfer of the title or a charge (an interest less than the fee simple title) from the registered owner, apart from a limited number of exceptions specified in the Act.¹⁰ This is judicially interpreted as protecting only persons acting in good faith who acquire an interest

- (c) a municipal charge, rate or assessment at the date of the application for registration imposed or that may after that date be imposed on the land, or which had before that date been imposed for local improvements or otherwise and that was not then due and payable, including a charge, rate or assessment imposed by a public body having taxing powers over an area in which the land is located;
- (d) a lease or agreement for lease for a term not exceeding 3 years if there is actual occupation under the lease or agreement;
- (e) a highway or public right of way, watercourse, right of water or other public easement;
- (f) a right of expropriation or to an escheat under an Act;
- (g) a caution, caveat, charge, claim of builder's lien, condition, entry, exception, judgment, notice, pending court proceeding, reservation, right of entry, transfer or other matter noted or endorsed on the title or that may be noted or endorsed after the date of the registration of the title;
- (h) the right of a person to show that all or a portion of the land is, by wrong description of boundaries or parcels, improperly included in the title;
- (i) the right of a person deprived of land to show fraud, including forgery, in which the registered owner has participated in any degree;
- (j) a restrictive condition, right of reverter, or obligation imposed on the land by the *Forest Act*, that is endorsed on the title.

Section 23(4) also provides that an indefeasible title is void against someone who was in actual adverse and rightful possession of the land the title covers at the time the land was first registered and who has continued in possession, but this has little significance today as a result of the lapse of time since most privately owned land was brought under the land title system. Under ss. 29(2)(c) and (d), an interest that is the subject of a pending application for registration and a lease or agreement for a lease for a period of less than three years accompanied by actual occupation can also take priority over the interest of a purchaser or chargeholder who has dealt with a registered owner in reliance on the register.

10. There are differing interpretations of the effect of s. 29(2) of the *Land Title Act*, *ibid.* when a purchaser has actual notice of an unregistered interest before the transfer of title. In some cases B.C. courts have held that a purchaser who registers a transfer with actual notice of a competing unregistered interest may acquire the title subject to the unregistered interest under certain circumstances. The conflicting interpretations are discussed in the British Columbia Law Institute *Report on Section 29(2) of the Land Title Act and Notice of Unregistered Interests* (Report No. 58, 2011), which contains recommendations for amendment of the Act to resolve the divergent interpretations.

from the registered owner in exchange for value.¹¹ While section 23(2)(e) provides that an indefeasible title is always subject to “a highway or public right of way, watercourse, right of water or other *public* easement,” purely private implied easements are not among the listed categories of unregistered interests in section 23(2) that encumber an indefeasible title without being specifically noted against it in the land title records.¹²

As a result, if an implied easement arises under the rule in *Wheeldon v. Burrows* and the original owner later sells the land retained from the first transfer to a third person acting in good faith, the purchaser will acquire it free of the *Wheeldon v. Burrows* easement. The rule in *Wheeldon v. Burrows* thus only has effect in British Columbia to the extent that it is not pre-empted by the operation of the *Land Title Act*. For the most part, the rule will only operate between the original parties. A *Wheeldon v. Burrows* easement would be void against a third party acquiring an interest in the servient land in good faith for value, though perhaps not as against a gratuitous transferee or a mere occupier.¹³

If, however, a *Wheeldon v. Burrows* easement becomes registered as a consequence of a court order confirming its existence, or is supplanted by an identical easement expressly granted at a later time and is then registered, it would of course have the same effect as any other registered easement and would bind subsequent purchasers of the servient land.¹⁴

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11. *Kaup v. Imperial Oil Limited*, [1962] S.C.R. 170; *Pacific Savings and Mortgage Corporation v. Can-Corp Development Ltd.* (1982), 37 B.C.L.R. 42 at 46 (C.A.). A recommendation is made in the *Report on Section 29(2) of the Land Title Act and Notice of Unregistered Interests*, *supra*, note 10 at 37-39 that persons acquiring an interest in land gratuitously from a registered owner also be entitled to protection under the section against unregistered interests. This would be in keeping with the plain meaning of section 29(2) of the *Land Title Act*, read without reference to the interpretational gloss restricting the benefit of the provision to *bona fide* purchasers for value.
 12. By contrast, in Alberta s. 61(1)(g) of the *Land Titles Act*, R.S.A. 2000, c. L-4 states that land covered by a certificate of title is subject to “any right of way or other easement granted or acquired under any Act or law in force in Alberta.” An “easement...acquired under any...law in force in Alberta” has been held to extend to easements arising under common law: *Petro-Canada Inc. v. Shaganappi Village Shopping Centre Ltd.* (1990), 76 Alta. L.R. (2d) 162 (C.A.). As a result, *Wheeldon v. Burrows* implied easements have been recognized in Alberta: *Canada Lands Co (CLC Ltd.) v. Trizechahn Office Properties Ltd.* (2000), 31 R.P.R. (3d) 39 (Q.B.). A similar provision exists in Manitoba: *Real Property Act*, C.C.S.M., c. R30, s. 58(1)(c).
 13. *Grieve v. Hartley*, 2006 BCSC 1112, at para. 37.
 14. See *Babine Investments Ltd. v. Prince George Shopping Centre Ltd.* (2003), 13 R.P.R. (4th) 305 (B.C.S.C.), where registration was directed as corollary relief following the judgment of the Court of Appeal. See *supra*, note 5.

2. COEXISTENCE WITH THE *LAND TRANSFER FORM ACT*

Sections 3 and 6 of the *Land Transfer Form Act*¹⁵ provide for the automatic passage of easements and certain other interests on a transfer of land or under a lease, respectively:

3 Every deed under section 2, unless an exception is specially made in it, includes all buildings, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, *ways*, waters, watercourses, lights, liberties, privileges, *easements*, profits, commodities, emoluments, hereditaments and appurtenances to the land comprised in it, belonging or in any way appertaining to it, or demised, held, used, occupied and enjoyed with it, or taken or known as part or parcel of it, and if it purports to convey an estate in fee simple, also the reversions, remainders, yearly and other rents, issues and profits of the land, and every part and parcel of it, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand, both at law and in equity, of the grantor in, to, out of or on the land, and every part and parcel of it, with their and all of their appurtenances.

6 Every lease under section 5, unless an exception is specially made in it, includes all buildings, yards, gardens, cellars, ancient and other lights, paths, passages, *ways*, waters, watercourses, liberties, privileges, *easements*, profits, commodities, emoluments, hereditaments and appurtenances to the land.

(Italics added.)

The original purpose of these provisions was to shorten the wording of documents used in land transactions by giving short, general formulas of words the effect of longer specific terms. It is no longer necessary to employ a “deed under section 2” of the Act or even to employ the general wording in a transfer of land to attract the result called for by section 3, because section 186(2) of the *Land Title Act* now provides that a transfer of a freehold estate in land in the approved form is deemed to be made under Part 1 of the *Land Transfer Form Act* (which includes section 3). Thus an ordinary registrable transfer of dominant land will have the effect of causing the easements that benefit the land to pass with the title.

Section 6 of the *Land Transfer Form Act* has the effect of extending to lessees the ability to exercise easements that benefit the leased land without being expressly mentioned in the terms of the lease, as long as the lease comes within section 5 of the Act. To come within section 5 of the Act, the lease need only refer to the Act or

15. R.S.B.C. 1996, c. 252.

its predecessor Acts and contain one or more of the abbreviated general clauses in column 1 of Schedule 4, such as a covenant to pay rent.

While sections 3 and 6 of the *Land Transfer Form Act* appear superficially to accomplish the same result as the rule in *Wheeldon v. Burrows*, they actually concern different subject-matter. They have been interpreted in British Columbia as ensuring that rights attached to land that were in existence prior to the transfer or lease will pass to the transferee or lessee, but not as creating new rights themselves.¹⁶ Thus, either diversity of ownership or occupancy of the dominant and servient lands is necessary before the transfer or lease in order for an easement to pass under these provisions, or else the transferor must have granted the easement to him- or herself earlier under section 18(5) of the *Property Law Act*.¹⁷ The rule in *Wheeldon v. Burrows*, however, results in the creation of easements *because of* a transfer, or lease or gift under a will. A *Wheeldon v. Burrows* easement could not exist before a transaction that results in two or more parcels being formed out of one body of land, thus creating the possibility of dominant and servient tenements.

16. *Babine Investments Ltd. v. Prince George Shopping Centre Ltd.*, *supra*, note 5 at para. 29, *aff'g* on this point (2000), 35 R.P.R. (3d) 287 (B.C.S.C.).

17. See note 3, *supra*. The English equivalent of s. 3 of the *Land Transfer Form Act* has been interpreted to be capable of converting privileges enjoyed by a lessee that potentially could be the subject of an easement, like the ability to cross a yard not included in the leased premises, into a legal easement if ownership of the leased premises is transferred to the lessee: see *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165; *Wright v. Macadam*, [1949] 2 K.B. 744; *Ward v. Kirkland*, [1967] Ch. 194 at 230.

II. PROBLEMS WITH THE RULE IN WHEELDON V. BURROWS

A. One Test or Two

1. GENERAL

The rule in *Wheeldon v. Burrows* has always been considered ambiguously formulated and difficult to apply.

One issue is whether the rule consists of one or two tests. The classic statement of the rule embraces rights over the servient land that are (a) “continuous and apparent” and (b) “necessary to the reasonable enjoyment of the property granted” that are exercised at the time of the grant for the benefit of the dominant land.

It is also unsettled whether the two branches of the rule are synonymous, disjunctive, or cumulative. There is some authority for all three interpretations.

2. SYNONYMOUS INTERPRETATION

It is possible to read the classic statement of the rule as setting up a single requirement expressed in two ways. This is because Thesiger, L.J., who enunciated it, linked the two formulas with “in other words.” In one relatively recent decision of the English Court of Appeal, it was said to be “tolerably clear” that Thesiger, L.J. intended the first and second expressions to mean the same thing.¹⁸ This approach is problematical because the two expressions appear to refer to different things. “Continuous and apparent” refers to the duration or pattern of use before the transfer and visible evidence of the pattern of use in question. “Necessary to the reasonable enjoyment of the property granted” appears to relate to the benefit the easement provides to the dominant land.¹⁹

18. *Wheeler v. Saunders*, [1995] 2 All E.R. 697 at 707 per Gibson, L.J.

19. Graham J. Ferris, “Problems Postponed: The Rule in *Wheeldon v. Burrows* and *Wheeler v. Saunders*,” [1996] 3 Web JCLI.

3. DISJUNCTIVE INTERPRETATION

Another reading is that the rule consists of two alternative requirements, and one or the other must be satisfied to establish an implied easement. Some decisions support this interpretation.²⁰

4. CUMULATIVE INTERPRETATION

The cumulative interpretation is that there are two separate tests, both of which must be satisfied. This view is supported by a number of leading decisions.²¹ The British Columbia decisions discussing the rule lean towards the cumulative interpretation.²²

B. “Continuous and Apparent”: What Does It Mean?

1. ORIGINS OF THE PHRASE

It has been said that the use of the phrase “continuous and apparent” in relation to easements derived originally from the French Code Civile. It was apparently introduced in the first edition of *Gale on Easements* in 1839 in connection with a theory of the author that English and French law converged in relation to the origin of implied easements. The theory assumed that easements could arise by implication in favour of the transferor in the same way as they could in favour of the transferee. It was firmly rejected in *Wheeldon v. Burrows* with a clear statement that rights which the transferor wishes to retain over the portion of land that is transferred away must be reserved at the time of the transfer.²³

The phrase “continuous and apparent” nevertheless persisted in the case law as part of the test for the existence of an implied easement arising from a transfer of land. The phrase has not been applied literally. As a result, there has always been a lack of clarity surrounding its meaning, leading to capricious results.

20. *Allen v. Taylor* (1860), 16 Ch.D. 355; *Brown v. Alabaster* (1887), 37 Ch.D. 490 at 505. This is also the view taken by Megarry and Wade, *The Law of Real Property*, 7th ed. at 1249.

21. *Sovmots Investments Ltd. v. Secretary of State for the Environment*, [1979] A.C. 144 (H.L.); *Borman v. Griffith*, [1930] 1 Ch. 493; *Goldberg v. Edwards*, [1950] 1 Ch. 247.

22. *Ellis v. Eddy Holding Ltd.* (1996), 7 R.P.R. (3d) 709 at para. 19 (S.C.); *Grieve v. Hartley*, *supra*, note 13 at para. 37.

23. A.W.B. Simpson, “The Rule in *Wheeldon v. Burrows* and the Code Civile” (1967), 83 L.Q.R. 240. See also the explanation of the French roots of the phrase “continuous and apparent” in *Suffield v. Brown* (1864), 4 De G.J. & S. 185, 46 E.R. 888, where Gale’s theory that there could be implied reservation of easements to a transferor was savagely criticized as inconsistent with the English doctrine of non-derogation from grant.

2. INTERPRETATION OF “CONTINUOUS”

A continuous easement in a pure sense is one that may be enjoyed constantly without activity on the part of the dominant landowner, such as a right to receive light.²⁴ The strict interpretation of “continuous” would exclude a right of way, because a right of way is generally used intermittently, not continuously. This strict interpretation is recited in a Canadian case, *MacVicar v. Maxwell*,²⁵ but it is not the interpretation generally followed in cases dealing with implied easements. Instead, the term “continuous” has taken on a meaning when used in relation to implied easements as something akin to permanence.²⁶ Implied easements consisting of rights of way have been upheld despite the fact that their use is not technically continuous.²⁷

3. INTERPRETATION OF “APPARENT”

An “apparent” easement has been described as one that is evidenced by some sign on the servient tenement or that is discoverable on “careful inspection by a person ordinarily conversant with the subject.”²⁸ Some examples of easements that have been held to be “apparent” are a watercourse running through visible pipes,²⁹ light

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24. E.H.Burn and J. Cartwright, *Cheshire and Burn’s Modern Law of Real Property*, 17th ed. (Oxford: Oxford University Press, 2006) at 610-611. This meaning of “continuous” in relation to easements seems to have a clear link with continuous servitudes under the French Code Civile: Simpson, *supra*, note 23 at 241.
25. (1959), 23 D.L.R. (2d) 669 at 671 (N.S.S.C.).
26. Megarry & Wade, *supra*, note 20 at 1250. In *Ward v. Kirkland*, [1967] 1 Ch. 194, Ungood-Thomas J. stated at 225: “The words ‘continuous and apparent’ seem to be directed to there being on the servient tenement a feature which would be seen on inspection and which is neither transitory nor intermittent.”
27. See *Borman v. Griffith*, *supra*, note 21 at 499; *Knock v. Knock* (1897), 27 S.C.R. 664. In *Babine Investments Ltd. v. Prince George Shopping Centre Ltd.*, *supra*, note 5, the British Columbia Court of Appeal found an implied easement of access via a closed lane that would not have been “continuous” in the strict sense.
28. *Pyer v. Carter* (1857), 1 H. & N. 916 at 922, 156 E.R. 1472 at 1475 (Ex.Ch.). *Pyer v. Carter* was effectively overruled by *Wheeldon v. Burrows* on the point of whether an easement could arise from a transfer in favour of a transferor without an express reservation, but this explanation of the meaning of an “apparent” easement continued to be cited in later cases.
29. *Watts v. Kelson* (1871), 6 Ch. Ap. 166.

flowing through windows,³⁰ drains discoverable with ordinary care,³¹ and a roadway.³²

By contrast, the right to take water from a neighbour's pump from time to time³³ and the right to project bowsprits of docked ships over a neighbouring coal wharf³⁴ have been held to be outside the meaning of "continuous and apparent," being both intermittently exercised and without being visibly evidenced by a sign on the land itself when not actually being exercised.

C. Second Branch of the the Rule: "Necessary" But Not "of Necessity"

One rare point that is certain about the rule in *Wheeldon v. Burrows* is that "necessary to the reasonable enjoyment of the property granted" in the second branch of the rule does not mean the same thing as an easement of necessity.

An easement of necessity arises when a transfer of land creates a parcel with no legally enforceable means of access or a particular use of land contemplated by the parties cannot be fulfilled without the easement in question.³⁵ Unlike the easements implied by the rule in *Wheeldon v. Burrows*, easements of necessity can arise in favour of either the transferor or transferee.³⁶ They do not have to be reserved by the transferor, although it may be more difficult for a transferor to make a case for an easement of necessity than a transferee, because the transferor could have reserved the right in question at the time of the transfer.³⁷

Sometimes "necessary to the reasonable enjoyment of the property granted" has been identified with convenience, i.e. the extent to which the easement claimed ac-

30. *Allen v. Taylor* (1880), 16 Ch. D. 355.

31. *Pyer v. Carter*, *supra*, note 28.

32. *Borman v. Griffith*, *supra*, note 21.

33. *Polden v. Bastard* (1865), L.R. 1 Q.B. 156.

34. *Suffield v. Brown*, *supra*, note 23.

35. *Gale on Easements*, 17th ed., *supra*, note 1 at 149.

36. *Corporation of the City of London v. Riggs* (1880), 13 Ch.D. 798 at 806.

37. As the doctrine of non-derogation from grant operates in favour of the transferee but not in favour of the transferor, the court may insist that the transferor pursue possibilities of gaining access by other means even if they are not legally enforceable at the time the claim to an easement of necessity is asserted. See *Adealon International Proprietary Limited v. Merton London Borough Council*, [2007] EWCA Civ 362.

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commodates the dominant tenement.³⁸ This would appear to differentiate the second branch of the test hardly at all from the requirement of any easement that it “accommodate and serve” and “be reasonably necessary for the enjoyment of” the dominant land.³⁹

Another leading decision focuses on the balance of convenience to the dominant land as opposed to the burden on the servient land. Under this interpretation, the heavier the burden on the servient land, the greater the evidence of convenience and need must be to justify finding an implied easement.⁴⁰

Some degree of need is required for a *Wheeldon v. Burrows* easement to arise, however. One writer has observed:

What appears to be necessary is that, to acquire an easement under *Wheeldon v Burrows*, the right in question must do more than merely accommodate the dominant tenement but need not be an absolute necessity. Rather it hovers, somewhere in between, at some ill-defined point between the two. The difference between what is essential for the land to be used and what is necessary for its reasonable use is not an easy one to draw and, in consequence, it may, in the future, prove difficult to predict when a quasi-easement will be transformed into a full easement under the rule.⁴¹

A test that makes prediction of results difficult after 130 years of application raises the question whether it is itself “ill-defined.”

38. *Ewart v. Cochrane* (1861), 7 Jur NS 925 at 926 (“convenient and comfortable enjoyment of the property”); *Horn v. Hiscock* (1972), 223 E.G. 1437 (driveway found to be a valuable convenience to the lease of a house without the driveway, even though alternate access from a lane was possible).

39. As enunciated in the leading case *Re Ellenborough Park*, [1956] Ch. 131 at 169, citing Cheshire, *Modern Law of Real Property*, 7th ed. at 457.

40. In *Goldberg v. Edwards*, [1950] 1 Ch. 247 (C.A.), the alleged easement was for passage through a hallway to an annex leased to the plaintiff at the rear of the main building. Access was available by a less convenient route that did not pass through the main building. The court declined to hold that passage through the front door and ground floor of the main building was necessary for the reasonable or convenient enjoyment of the premises behind the building, saying it would take “strong evidence” to show otherwise, particularly as the alleged right of way would disrupt the defendant’s business.

41. M.P.Thompson, “Paths and Pigs” (1995) 59 *The Conveyancer and Property Lawyer* 239 at 240.

D. Subdivision Control Reduces Relevance of *Wheeldon v. Burrows*

The little room left by the indefeasibility provisions of the *Land Title Act* for the operation of the rule in *Wheeldon v. Burrows* is reduced still further by present-day subdivision control.

Many of the cases concerning the rule have arisen from problems of access created when land is subdivided into parcels and sold off or leased. Today a proposed subdivision of a single parcel of land into more two or more parcels for the purpose of transfer or lease for a term of more than three years must comply with the requirements of Part 7, Division 2 of the *Land Title Act*.⁴² In order for it to comply, an approving officer must be satisfied that the proposed subdivision provides for sufficient access to the new parcels. Sections 75(1) and (3) of the Act state:

Requirements for subdivision

75. (1) A subdivision must comply with the following, and all other, requirements in this Part:
- (a) to the extent of the owner's control, there must be a sufficient highway to provide necessary and reasonable access
 - (i) to all new parcels, and
 - (ii) through the land subdivided to land lying beyond or around the subdivided land;
 - (b) all highways provided for in a subdivision plan or otherwise legally established on lands adjoining, lying beyond or around the land subdivided must be continued without unnecessary jogs and must be cleared, drained, constructed and surfaced to the approving officer's satisfaction, or unless, in circumstances the approving officer considers proper, security is provided in an amount and in a form acceptable to the approving officer;
 - (c)
 - (d)
 - (e) suitable lanes must be provided in continuation of existing lands and in every case where lanes are considered necessary by the approving officer.

42. *Supra*, note 8, s. 73(1).

- (3) In considering the sufficiency of a highway shown on a plan and to be dedicated to the Crown, the approving officer must consider the following:
- (a) the location and width of the highway;
 - (b) the suitability of the highway in relation to the existing use of the subdivided land and the use intended by the subdivision;
 - (c) the configuration of the land subdivided;
 - (d) the relation of the highway to be dedicated to an existing main highway or approach, whether by land or water, and local circumstances;
 - (e) on the question of width, the extent of the use, present and future, to which the highway may be put;
 - (f) the likely or possible role of the highway in a future highway network serving the area in which the subdivided land is located.

While discretionary relief from the access requirements for subdivision approval is possible, an approving officer (and in some cases the responsible minister) may only grant it in accordance with regulations in limited circumstances.⁴³

The existence of subdivision control likely prevents most situations in which resort to an implied easement under *Wheeldon v. Burrows* would be necessary to establish rights of access. It does not, of course, relieve situations that developed from land transactions that took place before the imposition of a process for subdivision approval, nor does it help greatly in preventing disputes from arising between land-owners or lessees concerning easements for matters other than rights of way and access, such as light, cattle grazing, drainage, parking, etc.

E. Summary

The rule in *Wheeldon v. Burrows* is obscure. There is a lack of clarity in each of its two branches, and the relationship between them is also unclear. The *Land Title Act* leaves the rule with a very narrow scope, as the rule generally operates only between the original parties. An easement to which the rule gives rise will not bind subsequent owners of the servient land unless it becomes registered as a result of a

43. *Supra*, note 8, ss. 76(1)-(3). See also *Land Title Act Regulation*, B.C. Reg. 334/79, ss. 8-15.

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court order confirming its existence. Modern subdivision control largely supersedes the need to rely on the rule to resolve problems of access.

The merits of retaining, discarding, or changing the rule in *Wheeldon v. Burrows* are canvassed in the next chapter.

III. REFORM

A. General

The persistence of the rule in *Wheeldon v. Burrows* in British Columbia appears to be an intriguing anachronism. A rule as obscure in its meaning and uncertain in its application as this one largely makes its own case for either abolition or reform. Each of these alternatives is considered in this chapter, with several variations.

B. One Alternative: Abolition of the Rule

It may well be asked whether retention of the rule in *Wheeldon v. Burrows* is justified, given that its scope is considerably restricted by the *Land Title Act* and the purpose it serves it is superseded to a great extent by the subdivision approval process. The law would be simpler, and more certainty would be achieved, by outright abolition.

The former Law Reform Commission of Victoria concluded that implied easements should be abolished altogether in favour of reliance on land registration and subdivision controls. It recommended deferring abolition for fifteen years to allow an opportunity for registration of implied easements.⁴⁴

It might equally well be asked, however, what harm there is in retaining the rule when it has so narrow a scope of operation and could produce a just solution in a few cases. The Project Committee was informed that landlocked parcels continue to exist in rural British Columbia, some stemming from early Crown grants that did not take account of future needs for roadway access. The rule in *Wheeldon v. Burrows* may still have a residual role to play in resolving access problems in a variety of settings. It is notable that, as a safeguard, the Law Reform Commission of Victoria recommended vesting jurisdiction in the administrative head of the Victorian

44. Law Reform Commission of Victoria, *Easements and Covenants* (Report No. 41) (Melbourne: The Commission, 1995) at 23.

land title system to order the creation of easements to deal with landlocked parcels or other extraordinary situations after the abolition of the rule.⁴⁵

The rule itself is not undermining the land title system, because unregistered implied easements are not binding on third parties relying on the title register. Outright abolition could have the effect, however, of undermining the larger principle of non-derogation from grant by preventing the assertion of rights that should be, and that before the transfer or lease were, incidental to ownership or possession of the land.

Subdivision control does not prevent access problems that arise in connection with leases of part of a land holding for a term of three years or less because approval from an approving officer is not required for these short-term leases. Abolishing the rule in *Wheeldon v. Burrows* entirely would deny a means of relief now available to a lessee who is obstructed in the effective use of the leased premises by another lessee of the same landlord.⁴⁶

While the rule is unsatisfactory in its present state, outright abolition would not be more beneficial than retaining the rule in a modified form.

C. Substitution of Judicial Discretion In Place of the Common Law Rule

1. GENERAL

A further alternative is to replace the common law rule with a judicial discretionary power to impose an easement in appropriate circumstances. British Columbia already has provisions of this kind, but their scope of application is narrow. Section 36 of the *Property Law Act* applies where a building or fence encroaches on neighbouring property. Among other powers, it gives the Supreme Court of British Columbia the discretion to grant an easement to the encroaching owner over the land encroached upon in exchange for payment of compensation.⁴⁷

Section 34(1) of the *Property Law Act* empowers the Supreme Court to grant permission to an owner of a dwelling to go onto adjoining land for the purpose of repairing or maintaining the dwelling if it is so close to the boundary that the in-

45. *Ibid.*

46. As occurred in *Borman v. Griffith*, *supra*, note 21.

47. *Supra*, note 3, s. 36(2)(a).

tended work cannot be done otherwise and the adjoining landowner has refused to consent or the consent is not reasonably obtainable.⁴⁸

Some Australian states have legislative provisions that empower courts to impose easements or “statutory rights of user” that are equivalent to easements but may be of limited duration in a much wider range of circumstances. Section 88K of the New South Wales *Conveyancing Act 1919* is typical of these essentially open-ended remedial provisions. It allows the court to impose an easement if it is “reasonably necessary for the effective use or development of other land.”⁴⁹ The prerequisites for the order are that the use of the benefited land be consistent with the public interest, the servient owner can be adequately compensated on terms fixed by the court, and the applicant has made reasonable but unsuccessful efforts to obtain a similar easement.⁵⁰

The substitution of judicial discretion for common law implied easements, with or without the power to order compensation to the servient owner or occupier, is an intriguing alternative but also one that carries with it a fundamental change in the nature of the rights involved. The common law rules concerning implied easements take effect by virtue of their own force, and when they are invoked, the court essentially declares rights but does not create them. In a system dependent on judicial discretion, the applicant has nothing unless and until the court decides that a right should exist.

2. JUDICIALLY IMPOSED EASEMENTS, EASEMENTS OF NECESSITY AND OTHER COMMON LAW IMPLIED EASEMENTS

If a discretionary judicial easement is to replace the rule in *Wheeldon v. Burrows*, it would likely have to replace the other common law implied easements as well in order to prevent confusion as to when an application to the court is required before access to the alleged servient land can lawfully be gained. Situations in which easements of necessity or of common intention arise are not always easily distinguishable from ones that would now attract the rule in *Wheeldon v. Burrows*.⁵¹ Acting on

48. *Supra*, note 3, s. 34(1). The order must state the period of time during which access to the adjoining land is allowed, and the applicant must compensate the adjoining landowner for damage, with a power in the court to fix the amount if it is not agreed upon. The court may impose additional terms it considers reasonable: s. 34(2).

49. *Conveyancing Act 1919* (NSW), s. 88K(1).

50. *Ibid.*, ss. 88K(2), (4). See also *Property Act 1974* (Qld), s. 180; *Law of Property Act* (NT), s. 164.

51. Regarding so-called “easements of common intention,” see note 4, *supra*.

a mistaken assumption that one has an easement of necessity or common intention, when one might really need to get an order imposing an easement before entering or engaging in any activity on or affecting the supposed servient land, would result in liability for trespass or nuisance. Claimants would likely apply to the court for a judicially imposed easement in any event in order to avoid potential liability, even if the other common law implied easements were not abolished.

It is questionable whether all common law implied easements should be replaced by a discretionary remedy. Easements of necessity can be a useful fail-safe mechanism in the law to provide relief where a landlocked parcel is inadvertently created or exists as an anomaly resulting from past transactions. Easements of common intention merely fulfil the intent of the parties regarding the use of the dominant land. When a case can be made out for an easement of necessity or one of common intention, the remedy should flow as of right and not as a matter of discretion.

3. COMMON LAW RULES AND JUDICIALLY IMPOSED EASEMENTS AS ALTERNATIVE REMEDIES

A variant of the purely discretionary solution would be to maintain the common law rules while providing also for judicially imposed discretionary easements. A party who was unsuccessful in showing that an implied easement arose under the common law could, by claiming in the alternative, preserve the ability to make a case for discretionary relief.

While this variant might be seen as an attempt to circumvent some of the uncertainty and technicality of the common law rules by allowing a case to be made for relief on the basis of fairness and practicality, it would not overcome the tendency that a discretionary regime would have of forcing claimants toward court to protect themselves against liability, should assumptions made and opinions given on the basis of the common law rules turn out to be wrong.

4. CONCLUSION REGARDING JUDICIAL DISCRETION TO IMPOSE EASEMENTS

We do not favour the introduction of an open-ended judicial discretion to impose an easement. It is essentially an expropriatory authority, since the easement is imposed rather than resulting from a transfer or lease. An imposed easement removes part of the servient owner's dominion over the servient lands, rather than being a logical implication stemming from the servient owner's own act or one dictated by law. In our view, a wide-ranging discretionary power to impose easements would create greater uncertainty in relation to property rights than the operation of existing common law rules. We hold this view despite the possibility that discretionary easements might be limited in duration by the terms of the order imposing them.

D. Codification and Modification of the Rule in *Wheeldon v. Burrows*

1. GENERAL

The remaining alternative is to replace the common law rule in *Wheeldon v. Burrows* with a clearer statutory one. Codification of the rule in a modified form holds out the possibility of achieving greater certainty, while preserving what value the rule may still have to achieve a just and effective solution between original parties to a transfer or between lessees of a common landlord.

2. ELIMINATING “CONTINUOUS AND APPARENT”

As a first step in approaching the reform of the rule in *Wheeldon v. Burrows*, it appears essential to eliminate the first branch. “Continuous and apparent” has never meant what it says, and has produced confused and contradictory jurisprudence since 1839. The phrase appears to have been introduced into English law in support of a doctrinal theory later rejected in *Wheeldon v. Burrows* itself. It was jettisoned in two recent examples of statutory reform of the rule in *Wheeldon v. Burrows*, namely those by the Irish Parliament (acting on a recommendation of the Irish Law Reform Commission) and the as yet unimplemented recommendations of the Law Commission of England and Wales.

3. IRISH REFORM OF THE RULE

The Irish reform of the rule is contained in section 40 of the *Land and Conveyancing Law Reform Act 2009*,⁵² which reads as follows:

40. - (1) The rule known as the Rule in *Wheeldon v. Burrows* is abolished and replaced by subsection (2).

(2) Where the owner of land disposes of part of it or all of it in parts, the disposition creates by way of implication for the benefit of such part or parts any easement over the part retained, or other part or parts simultaneously disposed of, which –

- (a) is necessary to the reasonable enjoyment of the part disposed of, and
- (b) was reasonable for the parties, or would have been if they had adverted to the matter, to assume at the date the disposition took effect as being included in it.

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- (3) This section does not otherwise affect –
- (a) easements arising by implication as easements of necessity or in order to give effect to the common intention of the parties to the disposition,
 - (b) the operation of the doctrine of non-derogation from grant.

Section 40(2) of the Irish statute contains two tests, the first (in section 40(2)(a)) reflecting the second branch of the rule in *Wheeldon v. Burrows* and the second test (in section 40(2)(b)) focusing on the imputed intent of the parties. The two tests are clearly cumulative, and it is not clear why they were both included. Section 40 as enacted differs somewhat from the provision originally recommended by the Irish Law Reform Commission. That recommendation comprised only the test in section 40(2)(b), which was explained as a statutory expression of the doctrine of non-derogation from grant.⁵³

4. RECENT REFORM RECOMMENDATIONS IN ENGLAND

In a report issued in 2011, the Law Commission of England and Wales rejected any intention-based test for the implication of an easement as relying on fictions. The Law Commission recommended instead a single statutory objective test for the implication of an easement, turning on a determination of what is “necessary for the reasonable use of the land.”⁵⁴ The Law Commission believed this test was sufficient to “encompass all those cases where the implication of an easement is of practical importance.”⁵⁵

The Law Commission also recommended that the test be applied with reference to the circumstances existing at the time of the transfer or other disposition of land, because any circumstances arising later could not have been contemplated by the

53. See [Irish] Law Reform Commission, *Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74) (Dublin: The Commission, 2005) at 136.

54. Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (LC 327) (London: The Stationery Office, 2011) 35. The Law Commission recommended that this test replace all existing common law rules for the implication of easements, not only the rule in *Wheeldon v. Burrows*. It also recommended that reservations of easements to the transferor be capable of implication under the same test, which would reverse the rule also affirmed in *Wheeldon v. Burrows* that a reservation of an easement will not be implied in a grant and must be express. The formula “necessary for the reasonable use of land” was derived from the wording “necessary to reasonable enjoyment of the land” used in the *Restatement (Third) of Property: Servitudes*. See American Law Institute, *Restatement (Third) of Property: Servitudes*, vol.1 (2002) at 202, sec. 2.15.

55. Law Commission, *ibid.*

parties. An easement linked to those circumstances could not logically or fairly be said to have been implied in the disposition, and would amount to an expropriation if it were to be imposed involuntarily.

The Law Commission recommended that the court be required to consider five non-exhaustive criteria when applying the test of whether an easement is “necessary for the reasonable use of the land”:

1. the use of the land at the time of the grant;
2. the presence on the servient land of any relevant physical features;
3. any intention for the future use of the land, known to both parties at the time of the grant;
4. so far as relevant, the available routes for the easement sought; and
5. the potential interference with the servient land or inconvenience to the servient owner.⁵⁶

In regard to the third criterion, the Law Commission distinguished between imputed intention to grant a particular easement, which it had rejected because of its fictional nature, and an intention actually held by at least one party for future use of the land that was known to both parties at the time of the transaction.⁵⁷

Another recommendation by the Law Commission was that it should continue to be possible for the parties to exclude implied easements by express agreement.⁵⁸

5. CONCLUSION

(a) A new unitary test

A single test for the implication of an easement that focuses on what rights would be required for reasonable use of a parcel being severed from a larger body of land, and which avoids imputing intentions to parties who never addressed their minds to easements, appears to be the most rational and straightforward approach. The

56. Law Commission, *ibid.* at 36.

57. *Ibid.*

58. *Ibid.*

test recommended by the Law Commission of England and Wales is of this kind. It is simple, broad, and flexible. Its adoption is recommended.

The Law Commission of England and Wales was also correct to conclude that the test must be applied in light of the circumstances at the date of the transfer or other transaction creating the separate parcels of land. Situations created from circumstances arising after the severing transaction must be dealt with by creation of new easements, not ones implied as the result of the past transaction. It may be noted that section 40(2)(b) of the Irish provision is also directed at the circumstances existing at the time of the disposition of land in question.

(b) Considerations for court in applying new unitary test

While simplicity and flexibility are desirable features of the proposed new unitary test of what easements would be required for reasonable use of the severed parcel, those same features easily give rise to the question “reasonable in light of what?” A non-exhaustive list of criteria for the court to consider, such as that recommended by the Law Commission of England and Wales, may help to achieve consistency in the application of the test.⁵⁹

The first four criteria in the Law Commission’s list, namely (1) use of the land at the time of the transaction severing the parcels; (2) the presence of relevant physical features on the servient land; (3) an intention concerning future use of the land that were known to both parties, and (4) the available routes for the easement claimed, all relate to the circumstances existing at the time of the severing transaction. These circumstances illuminate the nature of the rights that would be needed for reasonable use of the dominant parcel, and the parties can be assumed to have had them in contemplation at the time of the severing transaction.

The Law Commission’s report is unclear as to whether the first and third criteria relate to the use and intended use, respectively, of only the severed (dominant) parcel or of both the retained (servient) and severed parcels, because they refer only to “land” without distinguishing between parcels. In relation to the first criterion, it would make sense for the court to consider the use being made of the entire property at the time of the grant and not only the portion being severed. Until that point, the property is an integrated whole.

Under the third criterion, the use intended for both the retained (servient) parcel as well as that intended for the severed (dominant) parcel could be relevant to the

59. See the Law Commission’s list of five non-exhaustive criteria at pp. 22-23 above.

question of what easements will be needed by the owner or lessee of the severed parcel after the transaction. For example, suppose the transferor intends to erect structures on the retained parcel that will obstruct an existing access route to a thoroughfare that the transferor used previous to the severing transaction and which the transferee of the severed parcel would otherwise have to use afterwards to reach the thoroughfare. If this intention is known to both parties at the time of the transfer, it would be reasonable to imply an easement providing the servient parcel with alternate access to the thoroughfare, because it should have been in the contemplation of the parties. The third criterion, like the first, should be clarified to apply to both the retained and severed parcels.

The second criterion should not be restricted to physical features situated on the servient land. The presence of physical features on the dominant land at the time of the grant pointing to patterns of use consistent with the easement claimed may be equally relevant and should not be ignored. A roadway or cleared path on the dominant parcel contiguous with one on the servient land would be an obvious example. Another example would be agricultural irrigation pipes and sprinkler systems on the dominant land that need to remain interconnected with similar installations on the servient land in order to operate, or which could be operated by means of an easily restored service connection.

The last criterion, namely the extent to which the easement claimed could interfere with the servient land or inconvenience the servient owner, requires the court to weigh the interests of the parties. Balancing the interests of the dominant and servient owners or occupiers has not been a typical part of the reasoning used by courts when ruling on the existence of implied easements. Inasmuch as the recognition of an implied easement amounts to curing the omission of an express easement that would or should have been included in a conveyance or lease, however, balancing the interests of the respective parties is a logical substitute for assessment by the parties of their own respective interests in the context of the negotiation of a land purchase or lease. Balancing the interests of the parties is the most objective approach to determining what easements the parties should have foreseen as being ones the transferee or lessee of the severed parcel would need in order to make reasonable use of it.

The five criteria formulated by the Law Commission of England and Wales to aid the court in applying the proposed statutory test for implication of an easement are cogent and relevant. They should be incorporated into legislative provisions implementing the test, but with the first and third criteria being clarified, and the sec-

ond modified, so as to apply with reference to both the dominant and servient parcels and not merely to the severed parcel alone.

In keeping with the application of the proposed new test itself, the non-exhaustive list of criteria should also be applied in light of the circumstances existing at the time of the transaction creating the separate parcels of land.

(c) Harmonization with Land Title Act

A new statutory rule to replace the rule in *Wheeldon v. Burrows* in British Columbia must be configured with due regard to the indefeasibility of title under the land title system and the scheme of priorities between interests in land based on registration under that system. The rule should be expressly subject to the *Land Title Act*, so that it is clear that the rule is not intended to interfere with the operation of the Act.

(d) Exclusion of implied easements

We agree with the Law Commission of England and Wales that it should be possible to exclude implied easements by express terms in a transfer or lease, or by a contrary intention appearing from a will. Parties wishing to define and limit the rights between them by contract, and a testator wishing to widen or narrow the scope of a testamentary gift of part of the testator's real property, should have the freedom to do so.

(e) Transition

A further question is whether the legislative provisions implementing the conclusions reached above should apply only if the transaction creating the dominant and servient parcels of land takes place after the provisions come into effect, or should also apply to existing situations that arose from transactions that took place before the implementing legislation becomes effective.

Giving the implementing legislation purely prospective effect, or in other words allowing it to apply only if a transaction severing land into two parcels takes place after the effective date, would have a superficial attractiveness in creating a clear break between the application of the old law and the new. Provisions replacing the rule in *Wheeldon v. Burrows*, like the present common law rule itself, are nevertheless unlikely to find much room for application where subdivision control is in

place. Situations in the province that would call for the declaration of implied easements are more likely than not attributable to transactions that occurred in the absence of present-day subdivision control. Thus, purely prospective reform of the common law rule would probably not address the bulk of the cases where application of the reformed rule might have the greatest remedial effect.

We conclude that the implementing legislation should apply where the rule in *Wheeldon v. Burrows* would otherwise have applied, regardless of the date of the transaction. The only exceptions should be cases where a dispute concerning an implied easement has been resolved before the effective date by agreement, judicial decision, arbitration, or in some other manner, and those in which a proceeding is pending at the effective date of the implementing legislation.

(f) Recommendations

The Institute therefore recommends:

1. *The rule in Wheeldon v. Burrows should be abolished and replaced by an amendment to the Property Law Act providing that, if an owner of land disposes of part of the land by transfer, lease, or will, or disposes of all of the land in parts simultaneously, the transfer, lease, or disposition by will creates any easement for the benefit of the part disposed of over the part of the land retained, or over the other parts simultaneously disposed of, that is necessary at the time of the transfer or lease, or in the case of disposition by will, at the date of death, for the reasonable use of the benefited part of the land.*

2. *In determining, under the amendment referred to in Recommendation 1, whether an easement is necessary for the reasonable use of the part of the land disposed of, a court should be required to consider the following, in addition to any other matter the court considers relevant, in light of the circumstances existing at the date of the disposition:*

- (a) the use of the entire (dominant and servient) land;*
- (b) the presence on the dominant or servient land of any relevant physical features;*
- (c) any intention of a party to the disposition for the future use of the dominant or servient land, known to both parties;*
- (d) so far as relevant, the locations available for the easement sought; and*

(e) the potential interference with the servient land or detriment to the servient owner.

3. The amendments referred to in Recommendations 1 and 2 should operate subject to an agreement to the contrary by the parties to the disposition, or to a contrary direction contained in a will.

4. An easement arising under the amendment referred to in Recommendation 1 should be subject to the Land Title Act.

5. The amendments referred to in Recommendations 1 and 2 should apply regardless of whether the disposition of land took place before or after the effective date of the amendments, unless a dispute concerning the existence of an implied easement alleged to have arisen from the disposition has been resolved as of the effective date by agreement, judicial decision, arbitration, or in some other manner.

LIST OF RECOMMENDATIONS

1. *The rule in *Wheeldon v. Burrows* should be abolished and replaced by an amendment to the Property Law Act providing that, if an owner of land disposes of part of the land by transfer, lease, or will, or disposes of all of the land in parts simultaneously, the transfer, lease, or disposition by will creates any easement for the benefit of the part disposed of over the part of the land retained, or over the other parts simultaneously disposed of, that is necessary at the time of the transfer or lease, or in the case of disposition by will, at the date of death, for the reasonable use of the benefited part of the land.*

[p. 27]

2. *In determining, under the amendment referred to in Recommendation 1, whether an easement is necessary for the reasonable use of the part of the land disposed of, a court should be required to consider the following, in addition to any other matter the court considers relevant, in light of the circumstances existing at the date of the disposition:*

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- (c) any intention of a party to the disposition for the future use of the dominant or servient land, known to both parties;*
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PART TWO—DRAFT LEGISLATION

The draft legislation set out below is intended only as an illustration of one manner in which the recommendations in this report could be implemented and does not form part of the recommendations themselves.

Property Law Amendment Act, 20__

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

1. The *Property Law Act*, R.S.B.C. 1996, c. 377 is amended by adding the following section after section 18:

Abolition of the rule in *Wheeldon v. Burrows*

18.1 (1) The rule of law known as the rule in *Wheeldon v. Burrows* is abolished.

Comment: The rule in *Wheeldon v. Burrows*, also known as the doctrine of implied grant, holds that when a landowner transfers away or leases part of the land and retains the rest, the disposition serves to pass to the transferee or lessee easements over the portion of land that is retained that are “continuous and apparent,” necessary for reasonable enjoyment of the part of the land transferred or leased, and which were exercised by the landowner at the time of the disposition for the benefit of the part transferred away or leased. The rule has always been considered obscure and difficult to apply, particularly because of uncertainty surrounding the meaning of “continuous and apparent” and whether the branches of the rule are synonymous, alternative, or cumulative. The rule still applies in British Columbia to the extent that it is not superseded by the operation of the *Land Title Act*, which confines its application to the original parties insofar as transfers of land are concerned. Modern subdivision control has further eroded the scope for resort to the rule to deal with problems of access, but a clarified and simplified rule providing for implied easements can still be useful in achieving a just resolution of problems resulting from a failure of the parties to a transaction severing land into different parcels to adequately address a need for easements. Subsection (1) abolishes the common law rule in *Wheeldon v. Burrows* to pave the way for a reformed statutory rule to serve the same purpose.

Easement arising from disposition of land in parts

(2) If an owner of land disposes of part of the land by transfer, lease, or will, or all of the land in parts simultaneously, the transfer, lease, or disposition by will creates any easement for the benefit of the part disposed of

(a) over the part of the land retained, or

(b) over the other parts simultaneously disposed of,

that at the time of the transfer or lease, or on the effective date of the disposition by will, is necessary for the reasonable use of the benefited part of the land.

Comment: Subsection (2) expresses the statutory rule supplanting the rule in *Wheeldon v. Burrows*. The statutory rule provides a unitary test for the implication of an easement when part of a tract of land is transferred or leased or given by will, in contrast to the multiple branches of the rule in *Wheeldon v. Burrows*. The unitary test is whether the easement is necessary for the reasonable use of the part of the land that would benefit from the easement being in effect.

Matters the court must consider

(3) In determining whether an easement exists by virtue of subsection (2), the court must consider, in light of the circumstances at the date of the disposition:

(a) the use of the land retained or included in the disposition;

(b) the presence on the land retained or included in the disposition of any relevant physical feature;

(c) any intention of a party to the disposition for the future use of the land retained or included in the disposition, if known to the parties at the time of the disposition;

(d) so far as relevant, the available locations for the easement sought;

(e) potential interference with land not included in the disposition or detriment to the owner of that land; and

(f) any other matter the court considers relevant.

Comment: Subsection (3) requires a court to consider certain criteria in applying subsection (2) to determine if an implied easement arises. The list of criteria is non-exhaustive.

Implied easement subject to *Land Title Act*

(4) An easement arising under subsection (2) is subject to the *Land Title Act*.

Comment: The purpose of subsection (4) is to clarify that the creation of statutory implied easements under subsection (2) is not intended to interfere with the operation of the *Land Title Act*. Thus, an implied easement arising under subsection (2) from a transfer of land will generally be effective only between the original parties and will not bind a subsequent registered owner of the servient land unless the easement becomes registered against the title before the subsequent registered owner acquires the servient land. As an implied easement under subsection (2) arises by virtue of the subsection and is not created by a registrable instrument containing a grant of the easement signed by the servient landowner, registration would most likely be possible only pursuant to a court order made in a proceeding in which the easement was declared to exist.

Effect of subsection (2)

(5) Subsection (2)

- (a) does not operate to create an easement by reservation in favour of a transferor or lessor of land, or an owner disposing of land by will;
- (b) does not prevent an easement of necessity; and
- (c) is subject to express agreement to the contrary by the parties to a transfer or lease and to a contrary intention appearing from a will.

Comment: Subsection (5) affirms that subsection (2) does not create easements in favour of transferors. This makes it clear that subsection (2) is not intended to change the principle that a landowner wishing to retain an easement over the land being transferred must do so by an express reservation at the time of the transfer. Subsection (5) also clarifies that subsection (2) does not implicitly abolish or supplant easements of necessity, which arise when a parcel is landlocked by virtue of a disposition and access is impossible without an easement. Easements of necessity can arise by implication in favour of a

transferor. Easements of necessity remain outside subsection (2), which focuses on reasonable use rather than necessity.

Subsection (5) also clarifies that subsection (2) can be overridden by express agreement of the parties to a transfer or lease, or by the testator in the terms of a will disposing of land, so that an implied easement will not arise under the subsection.

Application of this section

(6) Subject to subsection (7), this section applies to a disposition of land referred to in subsection (2) that is completed before, on or after the date on which this section comes into force.

Comment: Subsection (6) indicates that the reformed rule in *Wheeldon v. Burrows* represented by these draft amendments is intended to apply regardless of when the disposition of land occurred, apart from those cases to which subsection (7) applies. If the application of the statutory reformed rule were confined to dispositions of land occurring only after these amendments came into force, the remedial effect of the statutory reformed rule would be considerably reduced.

When this section does not apply

(7) This section does not apply if, on the date on which this section comes into force, a dispute concerning the existence of an implied easement alleged to result from a disposition of land referred to in subsection (2)

(a) has been resolved by agreement, judicial decision, arbitration, or in some other manner, or

(b) is the subject of a pending proceeding.

Comment: Subsection (7) is an exception to subsection (6), which is the general transitional provision concerning these amendments. Subsection (7) indicates that these draft amendments are not intended to apply to disputes about implied easements that have already been resolved by judicial decision, arbitration, or settled by agreement at the time they come into force, or that are the subject of pending proceedings. The reform of the rule in *Wheeldon v. Burrows* reflected in the draft amendments is not intended to alter disputes already resolved. Those that are the subject of a proceeding pending at the effective date of the amendments should be decided on the basis of the law in effect when the proceeding was commenced, as the expectations of the parties concerning the result will have been based on the present rule rather than the reformed one.

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